



EAST AFRICAN LEGISLATIVE ASSEMBLY

COMMITTEE ON LEGAL, RULES AND PRIVILEGES

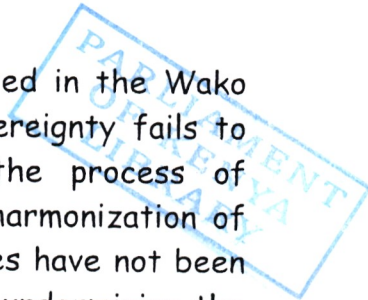
**REPORT ON THE FINDINGS AND RECOMMENDATIONS
OBTAINED FROM NATIONAL CONSULTATIONS ON THE
REVIEW OF THE TREATY FOR THE ESTABLISHMENT OF
EAC**

**Clerk's Chambers
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integration of the community. The Treaty, however does not propose the content and structure for implementing the political federation. Also it is yet to demonstrate visible signs to affirm the intention towards federation.

Political Will towards a federation is clearly articulated in the Wako Report but Partner States' unwillingness to cede sovereignty fails to reflect the political will towards fast tracking the process of integration. Thus while the Treaty provides for the harmonization of laws and institutions, legal systems in all Partner States have not been revised to cater for the process of integration hence undermining the principles of "*Pacta Sunt Servanda*".



LIST OF ABBREVIATIONS

AG	Attorney General
Art	Article
EACA	East African Court of Appeal
EA	East Africa
EAC	East African Community
EACJ	East African Court of Justice
EADB	East African Development Bank
EALA	East African Legislative Assembly
EU	European Union
GDP	Gross Domestic Product
MP	Member of Parliament
SADC	Southern Africa Development Community
SG	Secretary General
USD	United States Dollars
VAT	Value Added Tax

This report is a compilation of views obtained from all three Partner States together with input made by members of the Committee during a follow up meeting to discuss the three reports received from consultations held in Partner States held from April 6-9, 2005 in Nairobi. Following careful consideration of the views expressed and recommendations obtained the Committee intends to make specific proposals to be submitted to the Assembly for onward submission to the Council of Ministers, detailing measures needed to strengthen the Treaty to facilitate the vision and mission of the EAC.

The report is arranged in six main sections. Each section begins with a short introduction of the specific views raised and then narrows into particular areas addressed during the consultations. A number of people contributed their ideas on how to address the issues hence the recommendations are assembled together according to themes. Great effort is made to answer specific concerns raised as well as to clarify on prevailing misconceptions about the process of integration. In view of the fact that significant progress was made during the regional consultations, Members of the Committee met in Nairobi to harmonize the various views expressed during consultations in the three Partner States.

The report ends with a detailed action plan which emphasizes that review of the Treaty is an ongoing process, and will be realized when the Committee presents to the Assembly concrete proposals to guide review of the Treaty.

Executive remains unwilling to give protocols force of law thereby hijacking initiatives of the Assembly to the contrary effect.

There are different processes governing the ratification of international and regional legal instruments i.e. in Tanzania and Uganda it is done through parliament, while in Kenya it is done through the Executive. Also the practice with regard to the signing authority in each Partner State varies from one country to another.

2.1.1. THE STATUS OF THE TREATY IN NATIONAL AND INTERNATIONAL LAW

The Preamble reiterates the intention to bind the Partner States to commitments made under the Treaty and under International Law including the principle of *pacta sunt servanda*. Compliance with the dictates of international law is, however, implicit, not explicit in the Treaty. Some of the views received from stakeholders see fast tracking the integration process as unrealistic given the pace of integration. Thus while the Treaty provides for the harmonization of laws and institutions, legal systems in all Partner States have not been revised to cater for the process of integration. Also respective constitutions are yet to be amended to recognize the supremacy of the EAC for example the appellate jurisdiction of the EACJ. The Treaty *lacks a key chapter on fundamental human rights and freedoms*.

Partner States are yet to demonstrate compliance to the principle of *Pacta Sunt Servanda*. A case in point was the implementation of common external tariff (CET) on "Mitumba" and pharmaceuticals, a result of public outcry/strike and subsequent retraction and downward revision of the tariff on Mitumba from \$0.75 to \$ 0.30 in Kenya and the total removal of CET on pharmaceuticals in Kenya. (EA Budget Day - 8 June 2005) in contravention of the Customs Management Act and the commitment to "*Pacta Sunt Servanda*" principle.

Although the Treaty concentrates on economic integration and other development related paradigms, it concentrates power in the executive organs of the Community instead of the people of East Africa through the EALA

The Treaty, under Article 9 provides for the creation of the following organs and institutions of the Community:

- The Summit;
- The Council;
- Coordination Committees;
- Sectoral Committees;
- The East African Court of Justice;
- The East African Legislative Assembly;
- The Secretariat; and,
- Such other organs as may be established by the Summit

The Treaty does not indicate a clear structure that separates key roles and governance functions of the organs of the Community. Whereas the EALA and the EACJ have their roles clearly defined by the Treaty, the executive arm of the Community has too many layers with overlapping functions creating unnecessary bureaucracy in decision making. There are no clear provisions for checks and balances between organs of the Community as well as the various institutions operating under the community hence defeating the doctrine of Separation of Powers.

3.1.0. ORGANS OF THE COMMUNITY

3.1.1 The EACJ and Its Jurisdiction.

Since its inauguration in November 2001 there has only been one case filed in the EACJ that is *EACJ Ref 1 of 2005 Mwatela et al vs East African Community*. The mandate of the EACJ is limited to the interpretation, application and observance of the Treaty. Currently efforts are underway to extend the jurisdiction of the EACJ and there are proposals to model it along the lines of the former East African Court of Appeal (EACA). The relationship between the EACJ and national appellate courts is not clear. Therefore, there is need to resolve the question of jurisdiction of the court bearing in mind that, after the dissolution of the EACA, the three East African countries moved faster to fill the vacuum created in their legal systems. While Kenya and Tanzania retained the two-tier systems, Uganda opted for a three-tier system. This, as a matter of fact, will create problems when we vest the EACJ with appellate jurisdiction within the EAC.

consensus of the three Presidents whose decisions are arrived at through consensus. Consensus bogs down the process of decision-making and activities of the Community resulting in many initiatives being lost or stalled.

3.1.3. The EALA

The 27 elected Members of the EALA represent over 80 million people. The EALA serves mainly three functions:

- Representation
- Oversight functions e.g. vetting, censor and summons. The Assembly is critical to the federation and therefore its functions should be strengthened.
- Legislation.

While direct election remains the surest way of enabling people to have a say in regional governance, people have no direct role in electing their representatives to the regional Assembly.

There is general ignorance about the laws passed by the Assembly in most Partner States. Laws passed by EALA take precedence over national ones on matters pertaining to the implementation of the Treaty- Article 8(4). Further, most national MPs are unaware of the legal effect of laws passed by the Assembly and therefore fail to assess executive pronouncements and action based on commitments made at the regional level.

The fear that elections for members of the EALA were not direct is redundant because national MPs who elected EALA Members are representatives of the people from their constituencies. However, an independent electoral body should be established to handle election of EALA members.

Thus far the Council has so far sent only two Bills before the Assembly. Protocols under consideration are never brought to the respective National Assemblies of the Partner States. For example, at the moment there is a protocol being developed on free movement of people, yet the document has not been brought to the attention of the EALA.

Although lacking in autonomy and having diluted powers, the EALA makes the laws for the Community. The EALA, however, has no role in

managed before being disbursed to respective Partner States. In fact the Customs Union was formed in 1919 and was an important source of revenue for the Community. The Committee discussed the question of financing of the Community and it was noted that consultations in all the Partner States considered the aspect of sources of funds, formula for contributions, accountability for monies and financial sustainability of the Community in their deliberations.

It was noted that the budget of the Community is centrally prepared and managed. Given the magnitude of its operations the EACJ budget of USD 600,000 a year is too small and only covers salaries. There is no development budget or money to advance human resource requirements for the Community. As a result, key organs of the EAC, particularly the Secretariat, have lean staff minimizing their capacity to function effectively. The Community is unable to undertake initiatives that are more strategic to realization of its vision and mission. Presently financing of the community depends on mutually apportioned equal contributions through the Council of Ministers. This budget system does not address critical financial requirements of the EAC. Additional funds are obtained from development partners. This impacts on the performance of the Community in critical sectors especially its ability to higher highly qualified and competent staff.

Dependence on donors makes the Community vulnerable to those that finance its activities. For example the EAC has always been funded by Partner States and some donors. There is no system through which the Community and its leaders can be made accountable over fiscal operations and affairs. Currently, one organ, the Secretariat, controls finances with minimal checks over its powers.

While the EAC Treaty provides for equal contributions to the Community budget, experts felt that this is not a satisfactory arrangement because some countries may have a greater capacity to raise revenue than others. Likewise there is a lack of independence from the constraints and limitations experienced at national level budgeting. Moreover the system does not say what sanctions can be applied to those countries that fail to remit their contribution.

South Africa wanting to contribute half the budget if assured to have additional voting powers.

Therefore, there is need to devise a formula to determine the share of each member state for example members can be allowed to contribute according to the size of their revenue. The system of financing must take into account a number of factors i.e. the size of the population and of the economy; individual benefits accruing to a country; and national budgets. There must be explicit mention of sanctions against countries that fail to remit their contribution.

5.0. POPULAR REPRESENTATION IN THE EAST AFRICAN COMMUNITY

The EAC Treaty outlines the broad consensus of the peoples of East Africa on the system of cooperation and regional integration they envisage. It is however evident that East Africans have not been adequately consulted about regional integration. The Federation hinges on the political will of the Heads of State not on popular consensus which makes its foundation precarious.

Provisions of the Treaty are not understood clearly by the people of East Africa. A minority section of the Community know about the provisions of the EAC Treaty as it is yet to be translated into local languages and popularized beyond elite sections of the community.

Even though the current Treaty recognizes the need for civil society and private sector participation, there is absence of strong civil society involvement, the private sector and professional bodies in drawing up the Treaty and in facilitating the process of integration.

5.1.0. EMPHASIZING GOVANANCE

Political will is vital for there to be sound political, social and economic integration. In this regard, Good Governance is vital for the federation to fully take-off (Article 6). Most importantly, regional integration should be immediately put on the agenda to be debated and discussed regularly by all bodies. The Chairman of the Summit should be required to address the EALA to give direction on policy issues to be tackled during every year.

- (iv) There is need to make the EAC the focal point in all matters regarding review and amendment of the Treaty.
- (v) There are ambiguities in the language of the Treaty.
- (vi) There should be clear provisions on the task to be performed by each organ of the Community as envisaged in the doctrine of separation of powers.

6.1.2. Protocols

- (vii) There is over reliance on the use of Protocols to run affairs of the Community, and that the process of concluding protocols is very slow hence hampering development in the EAC.
- (viii) Instead of using the Assembly to enact laws, the Council of Ministers uses protocols to make the Treaty equivalent to an Act of Parliament

6.1.3. EACJ

- (i) there is a lot of enthusiasm among the peoples of East Africa about the EACJ being a court of appeal for East Africa which is not the case at the moment;
- (ii) there is demand from the populations of East Africa to expand the jurisdiction of the EACJ to cater for all interest groups;
- (iii) the procedure for appointment of judges to serve in the EACJ needs to be harmonized so that judges of the same rank and stature serve in the EACJ.

6.1.4. Executive organs of the Community

- (i) The executive arm of the Community has so many layers hence rendering it ineffective;
- (ii) Having established the Secretariat and given the lack of a proper executive in Arusha, the Secretariat has assumed that role, of the executive causing havoc in the process.

5. To enhance operations of the EACJ, Articles 23 to 27 of the Treaty be re-cast to provide for:
- (i) expansion of the EACJ both in original and appellate jurisdiction.
 - (ii) the establishment of a regional **Judicial Services Commission**, its composition, prescribes its functions, tenure of office as well as terms and conditions of service of the Judges of the EACJ. The functions of the Commission would be to propose names to the Summit of persons qualified to be appointed to serve in the EACJ; the Summit submits the names of those nominated to the Speaker for consideration by the relevant Committee of the House and for approval by the entire Assembly.
6. Article 48 of the Treaty be amended to provide for:
- (i) direct elections of Members of the Assembly. Presently, Members of the EALA are elected by their respective National Assemblies due to logistical and financial inadequacies. These are not likely to be surmounted in the near future.
 - (ii) Expansion of membership of the Assembly. The Committee proposes that in line with the views of the peoples of East Africa, membership of the Assembly be increased to 15 per country as originally proposed; and in order to have continuity and institutional memory, each Partner State during 2006 should elect six Members as an addition to the existing nine. In 2011, those who will have served two terms will vacate and each country would automatically elect other Members.
 - (iii) Provision of a regional Electoral Commission. In 2016, we should hopefully have solved the financial and logistical inadequacies to enable the people of East Africa to elect their representatives by universal adult suffrage.
 - (iv) Article 50 be amended to provide for the establishment of an Electoral Commission for purposes of conducting the said elections. The Article should also provide for the tenure of office, terms and conditions of service and that such a

- Regional integration will be useful and sustainable if supported by the masses. There is therefore need for a referendum on the EAC. Also the Treaty needs to be widely disseminated and popularized.
- There must be a system of checks and balances to ensure accountability of all organs of the community to the people of East Africa.
- Actualizing the Federation demands preparing the necessary groundwork at national levels and building stable institutions regionally to cater for East Africans.
- Country level coordination between ministries; ministries and the EAC; and the Executive and the EALA is crucial in facilitating the workings of the EALA and the EACJ.
- There is need to address in an open manner the challenges facing the Federation including the high level of mistrust about a regional federation in view of the experience of the former EAC. Additionally uneven levels of progress in partner states makes the masses anxious about the possible impact integration will have on local economies. There is therefore a need to instill a sense of confidence and assurance politically among leaders and among the population.
- Partner states still need to sort out the internal inconsistencies in political and legal frameworks before embarking on the regional.
- Partner States are yet to determine the ultimate form of the EACF. It is imperative that the federation be informed by actual, 'living examples' or case studies, and not just theories. The union between Tanganyika and Zanzibar could provide a basis for exploring options on the form of federation.
- It is important to learn from past failings and from other experiences of economic and political integration in order not to repeat past mistakes.
- There are a number of opportunities the process can be built upon to realize the federation envisaged.
- It is clear that the process of regional integration will be gradual and will need to be monitored periodically. The process can be adjusted in response to developments.

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